AZHAM OTHMAN; EX P AFFIN BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D-29-547-2010]
24 AUGUST 2011

BANKRUPTCY: *Notice - Whether bad in law - Bankruptcy Notice filed against social guarantor - Whether judgment creditor exhausted all avenues to recover debt from principal debtor - Whether leave of court mandatory to commence bankruptcy action against social guarantor - Mode of applying for leave - Bankruptcy Act 1967, s. 5(3)*

BANKRUPTCY: *Notice - Leave to issue - Whether leave of court mandatory to commence bankruptcy action against social guarantor - Mode of applying for leave*

This case raised the question as to whether s. 5(3) of the Bankruptcy Act 1967 ('the Act') required a judgment creditor ('JC') to obtain leave of court before commencing bankruptcy proceedings against a social guarantor. The section did not expressly provide for a leave requirement but merely stated that a JC "shall not be entitled to commence any bankruptcy action against a social guarantor unless he proves to the satisfaction of the court that he has exhausted all avenues to recover the debts owed to him by the debtor". No specific procedure or mechanism was provided for to enable the JC to satisfy the criteria set out in s. 5(3).

In the instant case, the principal debtor had been made a bankrupt for non-payment of a judgment sum relating to a hire-purchase agreement. Her husband, Azham bin Othman, the judgment debtor ('JD'), was a guarantor under the agreement. The JD applied to strike out the bankruptcy notice ('BN') filed against him by the JC. The JD argued that he was a social guarantor and the JC must exhaust all avenues to recover the debt owed to it by the principal debtor before it could take bankruptcy proceedings against him. In relation to this, the JC argued that it had exhausted all avenues to recover the debt as the principal debtor had been made a bankrupt. The senior assistant registrar allowed the JD's application. Dissatisfied with the said decision, the JC appealed to the judge.

A As there were no case laws on the issue and no provision equivalent to s. 5(3) of the Act in the United Kingdom or other related jurisdictions, the court sought the assistance of *amicus curiae* and invoked its inherent jurisdiction to decide the issue.

B **Held (dismissing the appeal with no order as to costs):**

(1) There was no positive evidence before the court that the criteria set out in s. 5(3) of the Act had been satisfied by the JC. As such, the BN was bad in law. (para 7)

C **(2)** There were various procedural methods the JC could employ to satisfy the criteria set out in s. 5(3) of the Act. One was O. 5 r. 3 of the Rules of the High Court 1980 ('RHC'). While the RHC generally may not apply to bankruptcy proceedings unless there was a *lacuna*, the seeking of leave was not a D commencement of bankruptcy proceedings under the Act or its Rules. (para 7)

(3) Alternatively, one may file an application (summons-in-chambers supported by affidavit) at the time the request for E issue of bankruptcy notice is filed and obtain leave of court before the BN is issued. The application could be *ex parte* and must specifically seek an order for the BN to be issued only upon leave being granted. It would be prudent to serve the application on the JD at leave stage at the last known address F to give him ample opportunity to contest the same. (para 7)

Case(s) referred to:

Algemene Bank Nederland NV v. Loo Choon Yow [1989] 2 CLJ 289; [1989] 2 CLJ (Rep) 846 HC ***(refd)***

Bank Bumiputra (M) Bhd v. Esah Abdul Ghani [1985] 2 CLJ 409; [1985] G CLJ (Rep) 41 SC ***(refd)***

Baxter Student Housing Ltd v. College Housing Co-Operative Ltd [1976] 2 SCR 475 ***(refd)***

Bungsar Hill Holding Sdn Bhd v. Dr Amir Farid Datuk Isahak [2005] 2 CLJ 809 FC ***(refd)***

Campeau v. Olympia & York Developments Ltd [1992] 14 CPC (3d) 339 H ***(refd)***

Canada (Minister of Indian Affairs & Northern Developments) v. Curragh Inc [1994] 114 DLR (4th) 176 ***(refd)***

Ex parte Woodall. In Re Woodall [1884] 13 QBD 479 ***(refd)***

Fairview Schools Bhd v. Indrani Rajaratnam & Ors [1998] 1 CLJ 285 CA I ***(refd)***

J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(refd)***

Krishnamurthy Nagaratnam, Ex P Mayban Finance Bhd [1990] 1 CLJ 504; [1990] 2 CLJ (Rep) 282 HC ***(refd)***

Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(foll)***

MEI Computer Technology Group Inc [2005] QJ 5744 ***(refd)***

Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***

Perwira Habib Bank (M) Bhd v. Sykt Johor Tenggara Sdn Bhd & Ors [1989] 2 CLJ 470; [1989] 2 CLJ (Rep) 248 HC ***(refd)***

Re A Debtor, Ex p Debtor [1934] 1 Ch 347 ***(refd)***

Re Babcock & Wilcox Canada Ltd [2000] 5 BLR (3d) 75 ***(refd)***

Re Blue Range Resources Corp [1999] 245 AR 154 ***(refd)***

Re Canadian Airlines Corp [2000] 20 CBR (4th) 1 ***(refd)***

Re Cheerio Toys & Games Ltd. [1971] 3 OR 721 ***(refd)***

Re City Construction Company Limited. [1961] 35 WWR 557 ***(refd)***

Re Darshan Singh Atma Singh, Ex P OCBC Bank (Malaysia) Bhd [1996] 1 LNS 330 HC ***(refd)***

Re Dylex Limited [1995] 31 CBR (3d) 106 ***(refd)***

Re Hj Khalid Abdullah; Ex P Danaharta Urus Sdn Bhd [2008] 2 CLJ 326 HC ***(refd)***

Re Lim Szu Ang, Ex P Kewangan Utama Bhd [2005] 7 CLJ 23 HC ***(refd)***

Re Olympia & York Developments Ltd [1995] 34 CBR (3d) 93 ***(refd)***

Re Olympia & York Developments Ltd [1997] 143 DLR (4th) 536 ***(refd)***

Re Regina and Unnamed Person [1985] 22 CCC (3d) 284 ***(refd)***

Re Royal Oak Mines Inc [1999] 96 OTC 272 ***(refd)***

Re Smoky River Coat [2000] 10 WWR 147 ***(refd)***

Re T Eaton Ltd [1997] 46 CBR (3d) 293 ***(refd)***

Re Tan Sri Kishu Tirathrai; Ex Parte Affin Bank Bhd [2007] 7 CLJ 270 ***(refd)***

Re United Used Auto & Truck Parts Ltd [2000] 16 CBR (4th) 141 ***(refd)***

Re Westar Mining Limited [1992] 6 WWR 331 ***(refd)***

Re Woodward's Ltd [1993] 79 BCLR (2d) 257 ***(refd)***

RHB Bank Bhd v. Gunasingam Ramasingam [2002] 5 CLJ 544 HC ***(refd)***

Skeena Cellulose Inc v. Clear Creek Contracting Ltd [2003] BCCA 344 ***(refd)***

Wee Chow Yong, Ex P; Public Finance Bhd [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349 HC ***(refd)***

UMW Industries (1985) Sdn Bhd v. Lim Chee Hian [2005] 1 CLJ 173 CA ***(refd)***

United Overseas Bank (Malaysia) Bhd v. Mok Hue Huan & Anor [2010] 9 CLJ 764 HC ***(refd)***

80 Wellesley St East Ltd v. Fundy Bay Builders Ltd [1972] OJ No. 1713 ***(refd)***

A **Legislation referred to:**
Bankruptcy Act 1967, ss. 2, 5(3)
Bankruptcy Rules 1969, rr. 18, 276
Rules of the High Court 1980, O. 2 r. 1(1), O. 5 r. 3, O. 92 r. 4

B *For the judgment debtor - Joseph Iruthayam; M/s Joseph Iruthayam & Co*
For the judgment creditor - CL Chin; M/s Syarikat Radhakrishnan
Amicus curiae - GK Ganesan (Geetha with him); M/s GK Ganesan
Mohd Azfar Abdullah; M/s Tunku Munawwir, Chin & Solomon

C *Reported by Ashok Kumar*

JUDGMENT

D **Hamid Sultan Abu Backer J**

[1] This is my judgment in respect of the judgment creditor's appeal against the decision of the senior assistant registrar who allowed the judgment debtor's summons to strike out the bankruptcy notice.

E

[2] The central issue in this case is whether s. 5(3) of the Bankruptcy Act 1967 imposes a duty upon the judgment creditor to satisfy the court that the judgment creditor had exhausted all the avenues against the principal borrower. And for the purpose
F of satisfying the statutory duty whether the judgment creditor must first obtain leave from the court to commence proceedings after satisfying the criteria notwithstanding there is no specific provision for leave in relation to s. 5(3) of the Bankruptcy Act 1967.

G **[3]** As there are no case laws dealing with this issue the court suggested to the parties that some assistance of *amicus curiae* may be desirable. In consequence the learned counsel for the judgment debtor had invited Encik GK Ganesan (assisted by KN Geetha), the well known author of *'Bankruptcy Law in Malaysia and*
H *Singapore: a Sourcebook'*; the learned counsel for the judgment creditor had invited Encik Mohd Azfar Abdullah to assist the court. Both have filed comprehensive submissions on the relevant issues the court needs to consider before coming to a decision. The court is grateful to their assistance.

I **[4]** Section 5(3) of the Bankruptcy Act 1967 states as follows:

A petitioning creditor shall not be entitled to commence any bankruptcy action against a social guarantor unless he proves to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtor.

Social guarantor is defined in s. 2 as follows:

A person who provides, not for the purpose of making profit, the following guarantees:

(a) a guarantee for a loan, scholarship or grant for educational or research purposes;

(b) a guarantee for a hire-purchase transaction of a vehicle for personal or non-business use; and

(c) a guarantee for a housing loan transaction solely for personal dwelling.

[5] The parties have relied on the following cases: *Bungsar Hill Holdings Sdn Bhd v. Dr Amir Farid Datuk Isahak* [2005] 2 CLJ 809; *Re Hj Khalid Abdullah; Ex P Danaharta Urus Sdn Bhd* [2008] 2 CLJ 326; *Re A Debtor, Exp Debtor* [1934] 1 Ch 347; *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104; *Re Lim Szu Ang, Ex P Kewangan Utama Bhd* [2005] 7 CLJ 23; *Wee Chow Yong Vienna Music Centre v. Public Finance Bhd* [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349; *Re Darshan Singh Atma Singh, Ex P OCBC Bank (Malaysia) Bhd* [1996] 1 LNS 330; *Algemene Bank Nederland NV v. Loo Choon Yow* [1989] 2 CLJ 289; [1989] 2 CLJ (Rep) 846; *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172; *UMW Industries (1985) Sdn Bhd v. Lim Chee Hian* [2005] 1 CLJ 173; *Ex parte Woodall. In Re Woodall* [1884] 13 QBD 479; *Re Krishnamurthy Nagaratnam, Ex P Mayban Finance Bhd* [1990] 1 CLJ 504; [1990] 2 CLJ (Rep) 282; *Bank Bumiputra (M) Bhd v. Esah Abdul Ghani* [1985] 2 CLJ 409; [1985] CLJ (Rep) 41; *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787; *Re Tan Sri Kishu Tirathrai; Ex P Affin Bank Bhd* [2007] 7 CLJ 270; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82; *RHB Bank Bhd v. Gunasingam Ramasingam* [2002] 5 CLJ 544; *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; *United Overseas Bank (Malaysia) Bhd v. Mok Hue Huan & Anor* [2010] 9 CLJ 764; *Perwira Habib Bank (M) Bhd v. Sykt Johor Tenggara Sdn Bhd &*

A *Ors* [1989] 2 CLJ 470; [1989] 2 CLJ (Rep) 248; *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319.

Brief Facts

B **[6]** The principal debtor who is the wife of the judgment debtor was made a bankrupt for non-payment of judgment sum relating to a hire purchase agreement. The insolvency office has agreed to accept a payment of RM200 per month from the principal debtor. In essence the argument of the judgment debtor before this court C is that he is a social guarantor, and the judgment creditor must exhaust all avenues before he could proceed with bankruptcy proceedings against him as a social guarantor. It is the judgment creditor (appellant)'s argument that all avenues in this case have been exhausted as the principal borrower has been made a D bankrupt.

[7] I have read the relevant application, affidavits and submissions of the parties in detail. I take the view the appeal must be dismissed. My reasons *inter alia* are as follows:

E

(I) It is not in dispute that s. 5(3) was new insertion to the Bankruptcy Act 1967, and such provision is not found in the United Kingdom or other related jurisdiction where the Malaysia court often refers to those judgments in coming to a F decision. What is clear is that there is a mandatory duty imposed on the judgment creditor to prove to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtor before he commences the bankruptcy proceeding.

G

Rohatul Akmar binti Abdullah, who was the Head of Legal Division, Department of Official Assignee, Malaysia in her article titled '*Recent Development on Insolvency Laws and Business Rehabilitation - National and Cross Border Issues*', makes the pertinent observation in respect of this section as follows:

H

> Individuals who voluntarily stood as guarantors for business or social purposes such as guarantors for education loans or hire purchase transactions are now protected with the recent amendment. They became bankrupt due to the default of the I principal borrowers who refused and or neglected to perform the payment obligations under the loan agreements.

Bankruptcy proceedings had always been the most favourable and the alternative proceedings taken by the creditors in order to recover their loan from either the principal borrowers of the guarantors. From the administration of the bankrupts' estates we realised that the creditors would normally hunt for the guarantors first before proceeding with the principal borrowers in bankruptcy proceedings. Therefore, there is a need to protect these social guarantors and one of the main amendments under the Act A1197 is the definition of social guarantor which was added in Section 2. That defines as,

'a person who provides, not for the purpose of making profit, the following guarantees:

(a) a guarantee for a loan, scholarship or grant for educational or research purposes;

(b) a guarantee for a hire-purchase transaction of a vehicle for personal or non-business use; and

(c) a guarantee for a housing loan transaction solely for personal dwelling.

It is pertinent to note that a new provision was also inserted in the Act A1197 that is section 5(3) that requires 'A petitioning creditor shall not be entitled to commence any bankruptcy action against a social guarantor unless he proves to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtor'. This is because the creditors namely the financial institutions, moneylenders and banks have been taking the easiest and shortest way out by claiming the defaulted loans from the guarantors directly after they have taken any step to locate the principal borrowers. The attitude of the principal borrowers who refuse to service their loans could sour the good relationship established between the borrowers and guarantors because most of the guarantors are normally the relatives or friends of the principal borrowers.

By protecting this group of the guarantors, it will indirectly stop the petitioning creditors from unscrupulously petitioning in court against the guarantors who become victim of the principal borrowers who do not service their loans. Most of these guarantors who stood as guarantors especially for educational purposes are normally not highly educated people living in remote areas and some are middle class wage earners who sincerely become guarantors for the sake of the borrowers whereby they gain no benefit from such loans. They should

A not be adjudged bankrupt even though they are jointly and severally liable under the guarantee with the principal borrowers.

Apart from the political and economic factors, we believe that education plays a major role in producing competitive and
B technological minded society. If these social guarantors are not protected and treated as the main borrowers in bankruptcy, it is feared that no one will to stand as a guarantor and this situation will then affect the education system and the economic growth of the nation as a whole.

C Therefore the petitioning creditors are required to take and make use of all the other avenues permitted under the law to recover their debt from the principal borrowers such as writ of seizure and sale or judgment debtor's summons. These proceedings are much faster and more effective compared to
D the bankruptcy proceedings and they could recover their debts in full without having to share in *'pari passu'* with other creditors claiming the debtors. It is through this amendment and the insertion of the above provision, that the Malaysian government's policy to create a loving and caring society, and ensuring social justice will be achieved for its people.
E

(II) The shortcoming of this insertion to protect the social guarantor is that the draftsmen have not provided a specific procedure and mechanism to enable the judgment creditor to satisfy the criteria set out in s. 5(3). The failure will place
F judgment creditors in a position where they cannot issue a bankruptcy notice without the leave of court. Encik GK Ganesan *inter alia* says:

The next question is the procedure: when Parliament intends, particularly in a quasi penal legislation such as the
G Bankruptcy Act, to insert a procedure, but lays down no procedure either in the body of the statute or note received in the discerned specifically for this purpose in the Bankruptcy Rules 1969, then I think it is the duty of a High Court judge to create a procedure within the
H framework of the legislation and the Bankruptcy Rules 1967 in such a way as to bring to fruition the intent of Parliament.

In support of the proposition Encik GK Ganesan relies on a
I number cases; to name a few are as follows:

(a) In *Sita Ramlal v. Cheryl Scotland* (Civil Appeal No. 86 of 2002 (unreported) (Guyana Court of Appeal)) it was stated:

> Our Rules of Court 1955 make no provision for procedure in relation to prerogative writs, and I have searched the Rules of Court of 1900 in vain for any such rules of procedure. Reference was made by Stoby J to Order 1 Rule 3 of the 1955 Rules of Court which provides that wherever touching any matter of practice and procedure the Rules are silent, the Rules of the Supreme Court for the time being in force in England shall apply. Therefore our Rules of 1955 being silent on the procedure for prerogative writs the Rules of the Supreme Court in force in England would apply. However, in 1955 there were no Rules of the Supreme Court in England governing prerogative writs since these writs were abolished in 1938. Therefore, what was our position? Were we to continue to follow the procedure laid down by the Crown Office Rules of 1906 which were never formally incorporated into our Rules of the Supreme Court?.

(b) In *Fairview Schools Bhd v. Indrani Rajaratnam & Ors* [1998] 1 CLJ 285 the Court of Appeal held:

> The petition was filed under s. 218 of the Act in the court below and a liberal interpretation should be given to s. 253(2) of the Act. Where the Winding-up Rules make a specific provision for a particular matter, it would exclude a parallel provision in the rules of the court, but where the Winding-up Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provisions exist. If not, it can always resort to O. 92 r. 4 of the RHC. The powers of the court on hearing a petition provided by s. 221 of the Act are exercised in conformity with the RHC and the appeal is a rehearing.

Encik Mohd Azfar Abdullah says that the court may judicially intervene pursuant to r. 276 of the Bankruptcy Rules 1969 read in tandem with O. 2 r. 1(1) and O. 92 r. 4 of the Rules of the High Court 1980 to make an order as is deemed necessary to prevent injustice, and relies on books, articles and a number of cases. Some of them are as follows:

(a) In *Pacific Centre (supra)* Edgar Joseph Jr. (as he then was) observed:

> "It is also clear that the inherent jurisdiction of the Court includes all the powers that are necessary to fulfill itself as a Court of Law"; "to uphold, to protect, and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner.

A (b) Scott Bomhof in his article titled *'The Court's Inherent Jurisdiction – What Are the Limits?'* focuses on the following issues namely: (i) what is inherent jurisdiction? (ii) what are the general limitations on the exercise of inherent jurisdiction? (iii) when has the court exercised or refused to
B exercise inherent jurisdiction in the context of Companies' Creditors Arrangement Act (CCAA) and Bankruptcy and Insolvency Act (BIA) proceedings? (iv) an overview of the limitations on the exercise of inherent jurisdiction in insolvency proceedings.

C The learned author says:

> One of the most perplexing areas to provide advice on in the context of an insolvency is the extent to which the court will call upon, or refrain from calling upon,
D its inherent jurisdiction. While inherent jurisdiction has been called upon in a number of non-insolvency contexts, it is often utilized in the insolvency context to extend the scope of the court's jurisdiction to grant orders to further the objectives of the subject
E legislation. Although inherent jurisdiction has been applied in the case of the BIA in a number of scenarios, it is the forum of proceedings under the CCAA that inherent jurisdiction is most often called upon ... In determining what the term 'inherent jurisdiction' means, a number of judges and
F commentators have referred to the following definition from *Halsbury's Law of England*:
>
> > In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the
> G reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression,
> H to do justice between the parties and to secure a fair trial between them.

The relevant part of the author's article relevant to the instant case may be summarised as follows:

I

(a) The key restriction on the application of inherent jurisdiction appears to be that the doctrine cannot be used to override an existing statute or rule. In *Baxter Student Housing Ltd. v. College Housing Co-Operative Ltd.* [1976] 2 SCR 475 the court held:

> Inherent jurisdiction cannot, of course be exercised so as to conflict with a statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

(b) In *Re Regina and Unnamed Person* [1985] 22 CCC (3d) 284, 100 AC 305 9 Ont. CA, Zuber J of the Ontario Court of Appeal stated that:

> the limits of this power are difficult to define with precision but cannot extend to the creation of a new rule of substantive law.

(c) In Canada, the doctrine of inherent jurisdiction has been applied extensively to the rights of debtors and creditors in the context of proceedings under the CCAA and, to a more limited extent, the Bankruptcy and Insolvency Act. In the context of Companies' Creditors Arrangement Act, judges have appeared willing to provide relief which on its face exceeds the express provisions of the CCAA on the basis of the Spartan provisions of itself and on the facts that the court must rely upon its inherent jurisdiction to "fill in the gaps" so as to give effect to the objects of the Companies' Creditors Arrangement Act.

(d) In comparison, the BIA is often cited as being a more complete code for the treatment of creditors' claims in a bankruptcy and as such the role of inherent jurisdiction has less frequently been called upon to supplement the legislation. However courts have called upon inherent jurisdiction to supplement the provisions of the BIA where it is clear that Parliament has granted authority to issue orders that are discretionary or where it is necessary to call upon inherent jurisdiction to give effect to the provisions of the statute itself or to fill in gaps that are found in the BIA.

(e) Instances where inherent jurisdiction has been applied in the CCAA context are as follows:

(i) In *Re Westar Mining Limited* [1992] 6 WWR 331 the court held:

> The Court determined that it had the ability to grant the charge and in doing so confirmed that the creation of the charge was evidence of the court's exercise of its inherent jurisdiction in order to achieve the objectives of the CCAA.

(ii) In *Re Woodward's Ltd.* [1993] 79 BCLR (2d) 257 it was stated:

> The court specifically held that there was a broad scope under the CCAA to exercise its inherent jurisdiction.

The court held that the court should decline to exercise its inherent jurisdiction if, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company.

(iii) In *Re T. Eaton Ltd.* [1997] 46 CBR (3d) 293 (Ont. Gen/Div.) it was held:

> In dismissing the motion, the Ontario court held that it had inherent jurisdiction to permit the making of stay orders against third parties that were not creditors where the actions of such third parties would potentially prejudice the success of a plan.

(iv) In *Campeau v. Olympia & York Developments Ltd.* [1992] 14 CPC (3d) 339 it was held:

> The court determined that it had inherent jurisdiction to grant a stay of proceedings whenever it was just and convenient to do so in order to control a process or prevent an abuse of that process.

(v) In *Re Dylex Limited* [1995] 31 CBR (3d) 106 (Ont. Gen. D9v.) it was held:

> In the course of the CCAA proceedings, Dylex sought to terminate various retail leases prior to filing a plan of arrangement. The court specifically held that although there were no express provisions in the CCAA allowing the actions of Dylex, the

court had inherent jurisdiction to fill in gaps in the legislation to give effect to the objectives of the CCAA in the interim period between the filing of the initial order and the approval of a plan.

(vi) In *Re Blue Range Resources Corp.* [1999] 245 AR 154 it was held that

> This proceeding involved an application for authorization to terminate executory contracts in the context of a CCAA restructuring. The court determined that it had jurisdiction to authorize the contractual termination in order to promote the objective of the CCAA of allowing the company to reorganize its affairs.

(vii) In *Re Smoky River Coat* [2000] 10 WWR 147 it was held that:

> The court held that there was authority under the doctrine of inherent jurisdiction to grant security for the protection of creditors who supply goods and services after the filing of a CCAA petition but that caution is required when the court exercises such inherent jurisdiction.

(viii) In *Re United Used Auto & Truck Parts Ltd.* [2000] 16 CBR (4th) 141 (BCCA) it was held:

> The Court of Appeal held that the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim period. The court stated: "The origins of the receiver's jurisdiction are located in the equitable jurisdiction of the Court of Chancery and while that jurisdiction cannot be exercised contrary to a statute nothing precludes its exercise to supplement a statute and effect a statutory object".

(ix) In *Re Canadian Airlines Corp.* [2000] 20 CBR (4th) 1 (Alta. QB) it was held:

> The Court stated that inherent jurisdiction could be exercised provided that the objective of such an order must be important to the reorganization process itself. The court also applied a balance of

A

> interests test to determine whether the prejudice to the affected party was greater than the benefit achieved for the insolvent company.

(x) In *Re Babcock & Wilcox Canada Ltd.* [2000] 5 BLR (3d) 75 the court noted that:

B

> I note that the Courts of this country have utilized inherent jurisdiction to fill in any gaps in the legislation and to promote the objectives of the CCAA. Where there is a gap which requires bridging, then the question to be considered is what will be the most practical common sense approach to establishing the connection between the parts of the legislation so as to reach a just and reasonable solution.

C

D

(xi) In *Re Royal Oak Mines Inc.* [1999] 96 OTC 272 the court stated that:

> In light of the very general framework of the CCAA, judges must rely upon inherent jurisdiction to deal with CCAA proceedings. However, inherent jurisdiction is not limitless; if the legislative body has not left a functional gap or vacuum, then the inherent jurisdiction should not be brought into play.

E

(f) Instances in which inherent jurisdiction has applied under the BIA are as follows:

F

(i) In *Canada (Minister of Indian Affairs & Northern Developments) v. Curragh Inc.* [1994] 114 DLR (4th) 176 in reference to the provisions of the BIA governing the powers of an interim receiver, the court stated that Parliament had granted broad judicial discretion to make orders that would further the objectives of such legislation:

G

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what 'justice dictates' but also what 'practicality demands'. It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline.

H

I

(ii) In *Re Cheerio Toys & Games Ltd.* [1971] 3 OR 721 in this proceeding, a debtor appealed on an order from the Ontario Supreme Court directing the holding of a first meeting of creditors where the statutory quorum requirements set out in the BIA for such a meeting could not be met due to a dispute between creditors. The Ontario Court of Appeal dismissed the appeal and confirmed the ruling of the judge at first instance indicating that the bankruptcy courts have always had an inherent jurisdiction to provide a remedy in circumstances such as existed in the case before them. The Court of Appeal agreed with the lower court's decision that the court may draw on its inherent powers to give effect to the provisions of the statute.

(iii) In *Re City Construction Company Limited.* [1961] 35 WWR 557 the Court of Appeal held that the court had jurisdiction to fill in gaps in the legislative language to further the purpose and intent of the legislation.

(iv) In *Re Olympia & York Developments Ltd.* [1997] 143 DLR (4th) 536 in a motion for directions in the bankruptcy of Olympia & York Developments Ltd., the court held that it had inherent jurisdiction to deal with any vacuum in the legislation so as to give purpose to the bankruptcy regime but went on to state that "there is no room for inherent jurisdiction if the legislature has dealt with the matter (or to the extent that it has not dealt with it exhaustively)".

(v) In *Re Olympia & York Developments Ltd.* [1995] 34 CBR (3d) 93 (Ont. Gen. Div.) (In another motion brought in the said case), while the court held that it could not grant a receiving order if the statute prohibited it in the circumstances, it contrasted such situation with the inherent jurisdiction of the court to deal with a vacuum which must be filled so as to give purpose and meaning to the legislation or to supplement what is permitted by the legislation.

(g) John Sandrelli in his article titled *'Jurisdiction of the Court in CCAA Proceedings: Inherent Jurisdiction vs. Statutory Declaration'* deals on the issue as to whether the courts are actually using its inherent jurisdiction when "filling in the

gaps" in cases brought under the CCAA or as to whether the courts are actually exercising a statutory discretion under the provisions of the CCAA. The said article examines the important case of *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.* [2003] BCCA 344 where the British Columbia Court of Appeal clarified the state of the law by explaining the true source of the court's authority to exercise discretion in CCAA proceedings. Madam Justice Newbury JA in writing for the unanimous Court of Appeal cites with approval an article by Sir Jacob QC in which the author notes the distinction between inherent jurisdiction and statutory jurisdiction and the Court of Appeal ultimately adopts the views of Sir Jacob. Justice Edgar Joseph Jr. in the Malaysia case of *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 also quoted with approval the above-mentioned Article when invoking the inherent jurisdiction of the court when granting a Mareva Injunction.

(h) James Farley in the article titled: *'Commentary: Minimize codification by expanding use of inherent jurisdiction'* focuses on the CCAA and its inadequacies in this article but in quoting I.H. Jacob's article *('The Inherent Jurisdiction of the Court')* the author quotes I.H. Jacob as stating: "It is superior courts of record which has this power". Notwithstanding its civil code orientation, the Quebec Superior Court has it as well (see *MEI Computer Technology Group Inc.* [2005] QJ 5744 (SC)). Statutory courts do not have this power unless specifically granted to them by statute. Far from being restricted to process, inherent jurisdiction is fundamental to ensuring that justice is done substantively (see *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.* [1972] OJ No. 1713 (CA) which stated: "Except where provided specifically to the contrary, the court's jurisdiction is unlimited and unrestricted in substantive law in civil matters". The article concludes that inherent jurisdiction is not palm tree justice. Rather, as an element to the common law, it should be used sparingly (cautiously, but as often as truly required). Any decision based upon this power should be in the tradition of the common law – incremental extensions of existing law, judicially and judiciously arrived at on a reasoned basis,

using analogy from established principles where possible. The objective of the judge should be that no informed person is surprised.

(i) All the above proposition can be summarised as follows:

(a) Inherent jurisdiction cannot be exercised so as to conflict with a statute or rule;

(b) Since inherent jurisdiction is an extraordinary power, it should be exercised only sparingly and in a clear case;

(c) Inherent jurisdiction should be used where it is necessary to promote the objectives of the legislation;

(d) The court should undertake a balancing of interests in order to determine whether it is appropriate to apply inherent jurisdiction if the prejudice to the affected party is greater than the benefit that will be achieved if the court exercises its inherent jurisdiction.

(III) In my view that failure to provide a specific procedural mechanism does not mean the judgment creditor cannot seek the leave of court and satisfy the criteria in s. 5(3) of the Bankruptcy Act 1967 before issuing the bankruptcy notice. In my view there are various procedural methodologies the judgment creditor could employ to satisfy the criteria set out in s. 5(3). One is O. 5 r. 3 of the Rules of the High Court 1980 which states:

> Proceedings by which an application is to be made to the High Court or a judge thereof under any written law must be begun by originating summons except where by these rules or by or under any written law the application in question is expressly required or authorised to be made by some other means. This rule does not apply to an application made in pending proceedings.

I am mindful of the fact that the Rules of the High Court 1980 generally may not apply to bankruptcy proceedings unless there is lacuna. However, on this issue it must be noted the seeking of leave is not a commencement of bankruptcy proceedings under the Bankruptcy Act 1967 or its rules. I am also mindful of the fact of the decision of Justice Gopal Sri Ram JCA (as he then was) in *Malaysia*

Building Society Bhd (supra) where it was held that the Bankruptcy Act 1967 is a complete code within the framework of which must be found all the powers exercisable by the high court by the bankruptcy jurisdiction. If O. 5 r. 3 of the Rules of the High Court 1980 is not employed then taking the lead from the above case one may file an application at the time the request for bankruptcy notice is filed and obtain the leave of court before the bankruptcy notice is issued. The application can be *ex parte* and must specifically seek an order for the bankruptcy notice to be issued only upon leave being granted. It will be prudent to serve the application to the judgment debtor at leave stage at the last known address to give ample opportunity for the judgment debtor to contest the same.

Encik GK Ganesan asserts that the above procedural methodology will also be consistent since:

(a) Rule 18 of the Bankruptcy Rules states that "Except where these Rules or the Act otherwise provide, every application to the court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit."

(b) As the application under s. 5(3) of the Bankruptcy Act 1967 comes within the purview of the bankruptcy proceeding, an application to "satisfy the court ie, the Bankruptcy Court" ought to be made within the mode prescribed within the Act and its rules ie, by summons in chambers.

(c) The burden and standard of proof to be exercised is the same, ie, on a civil standard.

(d) This application functions as an *ex parte* leave application filed together with the request to commence the bankruptcy proceeding. If the court is satisfied that the judgment creditor has exhausted his remedies against the principal debtor, the bankruptcy notice may be issued. The judgment debtor can apply to set aside the leave.

In the instant case there is no positive evidence before the court that the criteria set out in s. 5(3) of the Bankruptcy Act 1967 has been satisfied by the judgment creditor. In consequence the bankruptcy notice is bad in law and the judgment creditor's appeal must be dismissed.

[8] For reasons stated above the appeal is dismissed with no order as to costs.

I hereby order so.